UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

MARYLAND INSTITUTE COLLEGE OF ARTS

Employer

and

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

Petitioner

Case 05-RC-145901

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act ("the Act"), as amended, a hearing was held on February 20, 2015 before a hearing officer of the National Labor Relations Board ("the Board"). The International Union, Security, Police and Fire Professionals of America ("the Petitioner") filed the petition seeking to represent a unit of "all full-time and part-time armed and unarmed security officers and dispatchers performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, employed by Maryland Institute College of Arts at 1300 W. Mount Royal Avenue, Baltimore, MD 21217, excluding all office clerical employees, professional employees, and supervisors as defined by the Act." The petition asserts there are approximately 26 employees in the proposed unit. The parties stipulated that the following bargaining unit is appropriate for the purposes of collective bargaining: all full-time and part-time security officers and dispatchers/institutional security officers employed by the Maryland Institute College of Arts ("the Employer") at its Baltimore,

Maryland facility, excluding all student security officers, office clerical employees, professional employees, managerial employees and supervisors within the meaning of the Act.

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act, that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act,[1] and that both parties are therefore subject to the jurisdiction of the Board.

I. ISSUE, POSITION OF PARTIES, AND CONCLUSION

The sole issue presented at the hearing is whether Institutional Patrol Officers (IPOs) are supervisors as defined in Section 2(11) of the Act.

The Employer's position is that IPOs are supervisors because they regularly serve as the Officer in Charge (OIC) of a shift, when there is no other manager or supervisor on duty. As the OIC, the Employer contends the IPOs exercise supervisory authority over the other guards. The Employer does not contend that the IPOs have any supervisory indicia when not acting as the OIC. The Petitioner's position is that IPOs do not perform supervisory duties at any time. The Employer may designate an IPO as the OIC at certain times, but, as the OIC, an IPO does not have supervisory authority, or make supervisory decisions or any other activities that constitute supervision under the Act. Based on the evidence developed at hearing, and the arguments made by the parties in each of their post-hearing briefs, I conclude that the Employer has not met its burden by sufficient evidence of proving that the IPOs are supervisors under Section 2(11).

[1] The parties stipulated, and I find, that the Maryland Institute College of Arts, a Maryland corporation with its sole facility in Baltimore, Maryland, is a non-profit private institution of higher education. During the past 12 months, a representative period, the Employer, in conducting its operations described herein, derived gross revenue of at least $1 million, and during that same period of time, the Employer purchased and received at its Baltimore, Maryland facility goods valued in excess of $5,000 directly from points located outside the State of Maryland.

II. FACTS

The Employer is a non-profit private institution of higher education with a campus in Baltimore, Maryland. The campus is comprised of several buildings, including buildings designated for student housing, and parking lots. The Employer employs individuals in various classifications within its Campus Safety Department, detailed below.

A. Campus Safety Personnel

The petitioned-for unit is in the Campus Safety Department, which contains the following personnel: Director of Campus Safety, Stephen Davis; Assistant Director of Campus Safety, Randy Humes; two sergeants; six IPOs; six Institutional Security Officers/Dispatchers (ISOs/Dispatchers); twenty security guards; eleven Eagle One officers; Building Monitors; and Campus Safety Aides. There is also one individual designated as the OIC on every shift. The OIC position is filled by a sergeant if one is working; otherwise, an IPO serves as the OIC. Sergeants typically fill the position during the weekdays, and the IPOs fill it during the weeknights and on weekends. The Employer also has a human resources department, which includes Associate Vice President Estevanny Turns.

1. Security Guards

The security guards are stationed at campus buildings and control access to and within the building, identify possible safety and security breaches, criminal activity, and provide information and direction to community members and visitors to the campus, among other duties. The parties stipulated to the inclusion of security guards in an appropriate bargaining unit. The record does not clearly establish whether security guards are armed or unarmed; however, the position description does not indicate that firearm certification is a required skill for security guards.

2. ISOs/Dispatchers

The ISOs/Dispatchers operate the radio and telephone systems from the dispatch base station. They provide information to the OIC and notify the OIC of any emergencies or other situations requiring the OIC's response. Additionally, the ISOs/Dispatchers can pass communications along between the OIC and the Director or Assistant Director of Campus Security if they are not on campus, or with emergency services. The parties stipulated to the inclusion of ISOs/Dispatchers in an appropriate bargaining unit. The record does not clearly establish whether ISOs/Dispatchers are armed or unarmed; however, the position description does not indicate that firearm certification is a required skill for ISOs/Dispatchers.

3. Eagle One Officers

Eagle One officers are uniformed Baltimore City police officers working for the Employer from 4:00 p.m. until 12:00 a.m. They patrol the campus and surrounding area and are dispatched to investigate suspected criminal activity, suspicious people, or other reports. They carry firearms and make approximately twenty-eight dollars per hour, around ten dollars an hour more than most of the IPOs make. The parties stipulated to the inclusion of Eagle One officers in an appropriate bargaining unit, further stipulating that Eagle One officers who have worked at least 250 hours in the past 12 months would be eligible to vote in any election.

4. Building Monitors and Campus Safety Aides

Building Monitors and Campus Safety Aides are student officers. The Building Monitors are stationed at the entrances to buildings, similar to security guards. The Campus Safety Aides patrol the interior of buildings and escort people between buildings or to parking garages as necessary, among other duties. The parties stipulated to the exclusion of all student security

officers from an appropriate bargaining unit. The record does not clearly establish whether Building Monitors and Campus Safety Aides are armed or unarmed.

5. IPOs

The IPOs patrol the campus grounds and surrounding areas. They investigate reports of crimes or other complaints and inspect the buildings, grounds, fire lanes and emergency exits for compliance with health and safety rules. There are six IPOs: Jonathan Mance, April Perkins, Anthony Pointer, Aaron Cook, Justin Taylor, and Tracy Hill. Each IPO works around forty hours per week, and spends a portion of that time as the OIC, though the amount of time each IPO spends as OIC varies. Four of the IPOs—Mance, Pointer, Cook and Perkins—work twelve hours a week in the OIC position. Taylor works around forty hours a week as OIC. IPO Hill, the most junior IPO, has no scheduled OIC hours, but occasionally will fill in for another IPO during a shift that IPO is scheduled to be the OIC. In such instances, Hill works as the OIC. The IPOs are unarmed.

B. OIC Duties

The OIC is the officer responsible for the shift. If a sergeant is on duty, then the sergeant is the OIC. If a sergeant is not on duty, then an IPO is the OIC. If there are two IPOs on duty, then the more senior IPO is typically the OIC. The OIC's responsibilities are described below.

1. Scheduling and Assigning

IPOs do not set the schedule for guards, including when individual guards work or how many guards work each shift; rather, the sergeant has that authority. When in the role of the OIC, IPOs have the authority to assign the scheduled guards to different buildings without needing to check with a sergeant or a higher-ranking individual first. Such authority is not

exercised every shift—the schedule issued by the sergeant includes the guards' building assignments, which the IPOs claim they are expected to follow.

However, the OIC can change the building assignments for guards during their shifts in certain circumstances: to accommodate an event on campus; to address the absence of a scheduled guard; in response to a criminal incident on campus; to take action for a student who has a problem requiring a response. In such instances, the OIC can change the guard assignments without needing to check with the sergeant first. In changing guard assignments, the IPOs will consider such factors as keeping high-priority buildings staffed and the demeanor of the particular guards, one of whom is considered to be overbearing at special events. The IPOs do not typically consider such factors as skill and seniority. The record does not indicate how often such reassignments occur, though the evidence indicates they are not rare, as the guards are often short-staffed. However, if all the guards scheduled for a shift show up and there are no events or other emergencies warranting reassignments, the IPOs assign the guards in accordance with the assignments listed on the schedule prepared by the sergeant.

The IPOs also have the authority to assign Eagle One officers to patrol particular areas during their shifts, though they do not exercise this authority often. Stephen Davis, the Director of Campus Security, specifically asks Eagle One applicants if they are willing to report to and take direction from the sergeants or IPOs that function as OICs. Additionally, the Employer's Operations Manual states Eagle One officers report "to the IPO/OIC on duty." The IPOs, however, are reluctant to exercise authority over the Eagle One officers because the Eagle One officers carry firearms and have arrest authority, whereas the IPOs do not carry firearms and only two out of six have arrest authority. Additionally, the Eagle One officers make around ten

dollars more per hour than the IPOs. As a result, Eagle One officers often come in for their shift and choose their own patrol routes without any input from the IPOs.

The parties disagree over whether an IPO has the authority to allow guards to arrive late or leave early when that IPO is serving as the OIC. The Employer maintains that the OIC has the authority to allow guards to arrive late or leave early without obtaining approval from management. As an example, Davis, the Employer's Director of Campus Safety, stated that an IPO allowed a guard to leave a shift early in two instances in the two weeks before the hearing. The Employer also states that if a guard calls out sick, the OIC has authority to call in another guard, even if that guard was in overtime. On the other hand, the Petitioner's witnesses dispute that they have such authority. IPO Mance stated that if a guard asks to leave early, Mance will obtain approval from a supervisor, because if he does not and something happens at that guard's building after he leaves, a supervisor will want to know who approved of the guard going home without first checking with the supervisor. Additionally, Mance claims that if a guard misses a shift, Mance can direct dispatch to call in a student if one is available, but he cannot call in a security guard or IPO because he cannot authorize overtime. Mance says the IPOs have been "strictly directed" that the only person who can authorize overtime is the Director of Campus Safety. Additionally, Mance testified that when the school closed its buildings early due to a recent snow storm and the guards wanted to know if they could leave when the buildings closed, the Assistant Director (Humes) told them to contact the sergeant, even though the sergeant was off-duty and Mance was the OIC.

2. Supervising and Directing

When serving as the OIC, the IPOs are responsible for overseeing guards in the execution of their duties, though the IPOs do not assign the duties. Under Section 12 of the Operations

Manual, the IPO is responsible for monitoring the guards' compliance with the Employer's policies, procedures, rules and regulations. An IPO also reviews the guards' work performance, conformance with state and campus laws, rules, regulations, instructions and procedures. The parties disagree over whether the IPOs have authority to discipline guards, but they agree that the the IPOs can at least tell the guards when they are doing something wrong and to tell them to stop doing it. IPO Mance testified that, while serving as the OIC, he will visit the guard posts to make sure the guards are there and working. If the guards are at a location with high traffic, or if there is an event, he will make sure they are visible and performing their tasks. The Employer also claims that an IPO, when serving as the OIC, is held accountable for the performance of the officers on their shifts, and that an IPO can receive a verbal reprimand, written guidance or counseling as a result of misconduct by the officers on that shift.

Additionally, if there is a situation raising safety concerns, such as a suspicious package or fire alarm, the IPO serving as the OIC takes charge and directs the other guards on how to respond. IPO Mance offered the example of a suspicious package found in a building during a shift when he was the OIC. When that happened, he ordered the guards to stay off the radio and to wait for him to respond to the building. Once there, he viewed the package and concluded it looked suspicious, so he directed the dispatch officer to contact Baltimore City and have them send a bomb squad. He took such action without obtaining approval from a higher office first.

IPOs are also responsible for keeping a patrol activity log of all activities that occurred during their shift. Each individual who serves as the OIC is required to maintain such a log. When serving as the OIC, an IPO must log the times that the IPO checks on the guards in the buildings, any radio or telephone communications they receive or send, incident reports they write, medical issues that occur, and any crime reported during the shift, among other details.

3. Disciplining

The parties dispute whether an IPO has the authority to discipline other guards when serving as the OIC. The Employer's witnesses claimed that IPOs have the authority to discipline employees when OIC, while the Petitioner's witnesses claim that IPOs do not have the authority to discipline employees.

a. The Employer's Evidence

Humes, the Employer's Assistant Director of Campus Safety, claims that, when serving as the OIC, the IPOs have the authority to discipline guards or to send guards home early for misconduct. In both cases, the IPOs would have to notify him or a sergeant, but not for permission. In the case of discipline, the IPO would write a disciplinary report, which the IPO would submit to the Assistant Director and the Director to review prior to the discipline being issued to the employee. Humes did not clarify how often he followed such reports, but did testify that he could not think of a time he changed a disciplinary report that an OIC had issued.

The Employer claims that, when serving as the OIC, an IPO can also discipline guards for being late. In such cases, the OIC would first give a verbal warning. Then, if the guard continued to be late, the OIC could issue a written warning. For such written warnings, the OIC would notify the Assistant Director prior to issuing the discipline, but not for permission.

Section 55 of the Operations Manual, titled "Disciplinary Procedures," states that complaints against security guards, dispatchers and other security employees should be taken to the OIC, who will conduct an investigation and "take action to correct the infraction." The manual states that the OIC may relieve an employee from duty due to misconduct and that the Director or his designee will investigate the matter and issue a decision within 10 days affirming, reducing or increasing the OIC's action. The manual accords the supervisor on duty discretion in

choosing the appropriate discipline, and allows the supervisor to "take immediate corrective discipline" consistent with departmental policies. The supervisor then must submit the documented discipline to the Director of Campus Safety and the Human Resources Department.

Section 55 also describes the types of corrective action a supervisor may take. The lowest discipline is an "oral reminder" or "verbal warning," in which the supervisor discusses the problem with the employee. The next discipline is a "written reminder," addressed to the employee by the supervisor and in which the supervisor describes the problem, states the rule or policy the employee violated, suggests a course of action, states the consequences of an absence in improvement, and provides for any follow-up action that is necessary. The next level of discipline is suspension, and then the final level is termination.

In spite of the authority referenced in the Operations Manual, Estevanny Turns, the Employer's Associate Vice President for Human Resources, searched the Employer's disciplinary records for disciplines issued by IPOs, and could find only two disciplines in the last five years. The first was a non-punitive counseling form issued to a guard in 2011 for insubordination. "Non-punitive" meant that it was an initial warning, and though no adverse action would be taken based on it, it still would affect the guard's progressive discipline, meaning that subsequent discipline would have adverse consequences. The second discipline was a written counseling issued in 2009 to a guard for repeated lateness. The Employer did not introduce any additional discipline issued by an IPO, though there has been no change in the disciplinary authority accorded to the IPO position, when an IPO serves as the OIC, since that time. Turns explained that the culture of the institution was to use a lot of verbal warnings.

b. The Petitioner's Evidence

The Petitioner's witnesses, on the other hand, claimed that they do not have the authority to take any form of disciplinary measure that would end up in the officer's personnel files. IPO Mance and Perkins stated that they have not issued discipline to other officers, and do not know of other IPOs that have done so. Mance also claimed that as far as he knew, even the sergeants have never issued discipline. He stated that all discipline went through the Director of Campus Safety, and that the Director was the person who issued discipline.

Both Mance and Perkins claimed that their authority with respect to discipline was limited to notifying higher authorities, such as a sergeant, the Assistant Director or the Director, who would provide instructions on what to do. Mance and Perkins stated they could collect administrative reports documenting an incident and submit those reports to a sergeant or another higher-ranking individual. Then, the sergeant or higher-ranking individual would determine what, if any, disciplinary action needed to be taken. For example, Mance said that he was the OIC when a guard was late for work unexcused, and Mance called a sergeant, who directed him to have the guard write an administrative report explaining why he was late and then send it to the Director. Perkins gave a similar example, stating that she was the OIC when a student officer complained about a guard. Perkins stated that all she could do was have the student and guard each write an administrative report, and then forward the reports to the Director. Perkins did not send the guard home or issue discipline.

Mance acknowledged that he could offer verbal discipline and non-punitive corrective action, but described such action as telling guards what they were doing was wrong and advising them to stop doing it. He stated he could not reprimand the officer, and there is no evidence that any such verbal warnings were communicated to management as part of the Employer's

progressive discipline. Mance stated that if a guard persisted in misconduct after Mance spoke with him, then Mance would notify the sergeant. He stated that he could not send a guard home early, for disciplinary or other reasons. Notwithstanding the language of the Operations Manual, Mance and Perkins each testified that when faced with an infraction, their superiors expected them to document the infraction with an administrative report and send it up the chain of command, at which point someone above them would make a determination as to what disciplinary action was appropriate.

C. Evidence of Secondary Supervisory Indicia

The Employer pays an IPO an additional fifty cents per hour when they serve as the OIC. Additionally, each class of guards wears a different uniform: building monitors and campus safety aides wear dark blue polo shirts with "DCS" patches attached, security guards wear sky blue uniforms, dispatchers wear French blue uniforms, IPOs wear dark navy blue uniforms, and sergeants wear chevrons on their sleeves. When they are the OIC, the IPOs wear orange epaulettes on their normal uniforms. However, the IPOs do not attend the Employer's supervisor meetings.

III. ANALYSIS

As explained below, I conclude that the Employer has failed to meet its burden of proving by sufficient evidence that the IPOs are supervisors as defined by the Act.

A. Legal Standard for Supervisory Status

Section 2(3) of the Act excludes from the definition of "employee" "any individual employed as a supervisor." Section 2(11) of the Act defines a "supervisor" as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Accordingly, under Section 2(11), individuals are deemed to be supervisors if they meet the following criteria: (1) they have authority to engage in any one of the above Section 2(11) indicia; (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. *See NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712–13 (2001) (citing *NLRB v Health Care & Retirement Corp. of America*, 511 U.S. 571, 573–74 (1994)).

Section 2(11)'s definition is read in the disjunctive, and thus the Board considers possession of any one of its enumerated powers, if accompanied by independent judgment and exercised in the interest of the employer, sufficient to confer supervisory status. *Id.* at 713. Supervisory status may likewise be established if the individual in question has the authority to effectively recommend one of the powers. *See, e.g.*, *Children's Farm Home*, 324 NLRB 61, 65 (1997). The Board has held that an effective recommendation requires the absence of an independent investigation by superiors and not simply that the recommendation be followed. *Id.*

The burden of proving supervisory status rests on the party asserting that status. *Kentucky River*, 532 U.S. at 711-12; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). The Board requires that supervisory status be established by a preponderance of the evidence, and lack of evidence is construed against the party asserting supervisory status. *Dean and DeLuca New York, Inc.*, 338 NLRB 1046, 1047-48 (2003); *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 n.8 (1999). The party bearing the burden must establish that an individual "actually possesses" a supervisory power; mere inferences or conclusory statements of

such power are insufficient. *See, e.g.*, *Golden Crest*, 348 NLRB 727, 731 (2006); *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Sears, Roebuck & Co.,* 304 NLRB 193, 194 (1991). Moreover, where evidence is in conflict or otherwise inconclusive for a particular Section 2(11) indicium, the Board will decline to find supervisory status for that indicium. *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 793 (2003). Accordingly, job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Golden Crest*, 348 NLRB at 731 (citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000)).

Since supervisors are excluded from the Act's protection, "the Board . . . exercise[s] caution not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect." *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006) (citing *Oakwood Healthcare, Inc.*, 348 NLRB at 686); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996).

B. The Employer Has Failed to Meet its Burden

The Employer presented evidence in an effort to prove that the IPOs have three of the supervisory indicia listed in Section 2(11): (1) to assign work to campus safety personnel; (2) to responsibly direct campus safety personnel in the performance of their work; and (3) to discipline or effectively recommend discipline of campus safety personnel. For the reasons provided below, I find that the Employer has not met its burden in proving by sufficient evidence that the IPOs have any of the three indicia.

1. Assignment of Work to Guards

The Employer failed to meet its burden of proving that the IPOs use discretion when assigning guards. Assigning is "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime

period), or giving significant overall duties, i.e., tasks, to an employee." *Oakwood Healthcare, Inc.*, 348 NLRB at 689. To attain supervisory status, the Employer must show that the authority to assign is independent, involves judgment and a degree of discretion that rises above "routine or clerical." *Id*. at 693. Assignments made solely on the basis of equalizing workloads or the compatibility of employees are routine or clerical in nature. *Id.*; *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994) (finding foreman not a supervisor despite ability to assign employees to different crews because assignment was based on compatibility of employees and skills required for the job and thus was based on his experience working with the employees rather than independent judgment).

Here, I find that the evidence is insufficient to prove that the occasional assignments made by the IPOs involve judgment and a degree of discretion that rises above being routine or clerical. The sergeants make most of the assignments, as shown by the schedules the sergeants issue to the IPOs, which has a category for "building assignments" that specifically states the buildings at which the scheduled guards are assigned. Though the parties agree that the sergeants and not the IPOs have authority to schedule the guards, Director Davis nevertheless claims that the IPOs are not bound by the assignments listed on the sergeant-created schedules. The Director's claims, however, are not supported by the evidence of how the sergeants actually treat the schedules. The sergeants, not the Director, deal with scheduling, and the evidence indicates that the sergeants do in fact prevent the IPOs from changing the assignments on the schedule. The sergeants print the building assignments on the schedules that they control and have the authority to make. The IPOs have no input into the creation of those schedules and cannot change those assignments ahead of time, as Mance and Perkins agreed that they did not have access to the schedules prior to receiving them. Nor can the IPOs generally change the

assignments once they receive them, as Mance explained that "[g]enerally my sergeant wants me to stick to the schedule." There is no testimony from either sergeant to rebut these claims, and so the evidence indicates that while the Director may think the IPOs are free to change the assignments issued to them, the reality is that the IPOs for the most part follow—and are expected to follow—the assignments made by the sergeants.

Moreover, even if the sergeants did not control the assignment of guards, the evidence calls into question how much discretion is utilized in assigning the guards on a shift. Assistant Director Humes initially claimed the IPOs, when serving as the OIC, consider such factors as crime trends and experience in assigning guards, and that the IPOs "try to change everybody around during the shift so nobody gets comfortable in one building." Yet when confronted with the schedule the sergeants issue to the IPOs, which lists the guards' building assignments, Director Davis contradicted the previous claim, stating "we have a number of staff people that are very comfortable in working a particular building, and what you see, a reflection here, are some of the officers who were [in] very specific buildings more often than not." The evidence is thus ambiguous as to whether such assignments are routine or actually require discretion, regardless of who makes them.

Aside from the scheduled assignments, the IPOs are able to reassign guards in certain limited circumstances, but there is insufficient evidence to prove that they exercise independent judgment and discretion on such occasions. The only example the Employer's witnesses provided of when an IPO serving as the OIC might change guards' assignments was during big events, or if a guard failed to show up. In such cases, the factors the IPOs used to reassign guards are routine or clerical. In the case of short-staffing, Mance and Perkins stated that the primary factor they considered was keeping the high-priority buildings staffed, with Mance

explaining that he would "take a person out of a less high priority building and move them into one that is a higher priority." For assigning guards to special events, Perkins specifically disavowed considering guards' skill and seniority, explaining that she would basically send any guard but one, who could "be a little overbearing" and was thus disfavored by the event coordinator. Such considerations, based on the guards' compatibility and the established priority of buildings, do not rise to the level of discretion required by Board law.

Moreover, the evidence indicates that an IPO's authority to assign guards in the special situations described above is routinely overruled by the supervisors, suggesting that the IPOs do not have much authority even to reassign guards. Mance explained that, about twice a month, he will assign a guard to a location when serving as the OIC, and the guard will contact the sergeant, who will then reassign the guard despite Mance's orders. Perkins also testified that her assignments are sometimes overridden by sergeants, providing the example of a time when she was the OIC and a guard told her that the sergeant had texted him directly to reassign him, without copying Perkins or explaining why the reassignment was necessary. Nevertheless, Perkins reassigned the guard according to the sergeant's request. Such routine reassignments by the sergeants, including direct reassignments to guards without even notifying the IPO serving as the OIC, suggest that even in the very limited circumstances where IPOs have reassigned guards, they possess only nominal authority.

Finally, the Employer claims that when serving as the OIC, IPOs have the authority to call in guards to fill unexpected vacancies and to grant requests for guards to leave work early. The Employer relies on conclusory statements that the IPOs have such authority, yet provides no evidence that demonstrates the IPOs actually exercise it, though the IPO witnesses deny having such authority. Mance explained that while he could ask an ISO/Dispatch officer to call in a

student officer if one is available, he could not call in a guard because "we are strictly directed that the only person that can authorize overtime of building guards is the Director of Campus Safety." In the absence of evidence demonstrating that IPOs can and have called in guards, I find Mance's testimony that the IPOs cannot authorize overtime consistent with the undisputed fact that the IPOs do not have authority to schedule guards. Additionally, Mance offered unrebutted testimony regarding a recent snowstorm in which Assistant Director Humes advised the guards that certain school buildings would close early. Yet when the guards asked if they would be able to leave early when the buildings closed, rather than refer them to the OIC during the shift (Mance), Humes directed the guards to call Sergeant Crutchfield, who was not working at that time. Such testimony indicates that the IPOs do not in fact have the authority to call in guards or release them early.

2. Responsibly to Direct

The Employer also failed to provide sufficient evidence to show that the IPOs responsibly direct other employees. To prove responsible direction, the Employer must show that the alleged supervisor: (1) directs employees as to "what job shall be undertaken next or who shall do it," and (2) is "accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Oakwood Healthcare, Inc.*, 348 NLRB at 691-92. An individual is therefore not a supervisor solely because of his ability to direct an employee's work; there must be an element of accountability as well. Additionally, as with all of the Section 2(11) elements, the responsible direction must be carried out with independent judgment, meaning the judgment cannot be dictated or controlled by detailed instructions. *Id.* at 693.

To prove an employee's accountability, the Employer must offer evidence of actual accountability, even if it is just the prospect of actual accountability. The Board has made clear that a "paper showing" of accountability is insufficient to meet the Employer's burden:

> ….in determining whether accountability has been shown, we shall similarly require evidence of actual accountability. This is not to say that there must be evidence that an asserted supervisor's terms and conditions of employment have been actually affected by her performance in directing subordinates. Accountability under *Oakwood Healthcare* requires only a *prospect* of consequences. But there must be a more-than-merely-paper showing that such a prospect exists.

Beverly Enterprises-Minnesota, Inc., 348 NLRB 727, 731 (2006); *see also Training School at Vineland*, 332 NLRB 1412, 1416 (2000) ("Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority.").

Here, the Employer's evidence is insufficient to demonstrate the actual prospect of accountability because it constitutes no more than a paper showing. To support its claim that the IPOs are held accountable, the Employer relies primarily on its Operations Manual, which states that the OIC "accepts responsibility for the immediate supervision and control of all assigned personnel and is personally responsible for their efficiency and effectiveness as members of the Department." When asked about the provision, Assistant Director Humes stated that as IPO could be disciplined for the conduct of guards on her shift when that IPO was acting as the OIC. The Employer does not offer, however, any evidence of an IPO being held accountable for the misconduct of guards on their shifts when that IPO was serving as the OIC. Similarly, the Employer fails to offer a "more-than-merely-paper showing" that the prospect of discipline exists for an IPO based on the

guards' conduct when that IPO was serving as the OIC. For example, despite his more than eight years working for the Employer, many of which were spent as an IPO, Assistant Director Humes did not offer one example demonstrating such accountability. Nor did the Employer provide any disciplinary reports referencing or indicating such accountability. The Employer thus offered nothing more than its Operations Manual and Assistant Director Humes' explanation of it to demonstrate accountability. I view such evidence as insufficient to establish supervisory status.

3. Discipline

The Employer fails to meet its burden in proving that the IPOs have the authority to discipline guards or to effectively recommend discipline when serving as the OIC. In *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002), the Board adopted a Regional Director's finding that:

> [T]he power to "point out and correct deficiencies" in the job performance of other employees "does not establish the authority to discipline." Reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations. To confer [Section] 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel.[2]

In *ITT Lighting Fixtures*, the Board stated that to support a claim that individuals had the authority to effectively recommend discipline, the party asserting supervisory status must prove that: (a) the putative supervisors submit actual recommendations, and not merely anecdotal reports; (b) their recommendations are followed on a regular basis; (c) the triggering disciplinary incidents are not independently investigated by superiors; and (d) the recommendations result from the putative supervisor's own independent judgment. 265 NLRB 1480, 1481 (1982), enf.

[2] The Board cited this proposition in *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 2 (2014).

denied on other grounds 712 F.2d 40 (2d Cir. 1983), cert. denied 466 U.S. 978 (1984). The Board has consistently refused to find supervisory status where the putative supervisor's role in discipline is found to be merely reportorial. *Riverboat Services of Indiana, Inc.,* 345 NLRB 1286, 1286 (2005); *Hillhaven Rehabilitation Center*, 325 NLRB 202, 203 (1997); *Northwest Nursing Home*, 313 NLRB 491, 497-98 (1993); *The Ohio Masonic Home*, 295 NLRB 390, 394 (1989).

Here, I find that the Employer did not meet its burden of establishing by sufficient evidence that the IPOs, when acting as the OIC, have authority to discipline employees. The Employer relies largely on its Operations Manual, which states that the OIC has the authority to "take immediate corrective discipline with an employee under his authority." However, the Petitioner introduced testimony from IPOs denying that they have such authority, and have not exercised it themselves nor known other IPOs to exercise that authority. Thus, I view the evidence as in a state of equipoise, and I view the Operations Manual as more indicative of "paper authority" that is insufficient to establish Section 2(11) status. *See, e.g., The Lutheran Home*, 264 NLRB 525, 533 (1982) ("Board law is clear that the mere use of a title or the giving of 'paper authority' which is not exercised does not make an employee a supervisor."); *Security Guard Service, Inc.*, 154 NLRB 8, 10 (1965) ("The Board has held that the mere issuance of a directive to alleged supervisors, setting forth supervisory authority, is not determinative of their supervisory status. The absence, for all practical purposes, of the exercise of such authority negates its existence.").

To substantiate its claims, the Employer offered two disciplines issued by the POs, but the disciplines are too old and isolated to prove actual authority. *See Shaw, Inc*, 350 NLRB 354, 357 (2007) (isolated incident of foreman disciplining employees insufficient to convey

supervisory status); *Robert Greenspan, D.D.S., P.C.*, 318 NLRB 70, 70 (1995) (finding "authority to recommend transfer is exercised too infrequently to establish supervisory status" where it was exercised four times by purported supervisors); *Highland Telephone Cooperative, Inc.*, 192 NLRB 1057, 1058 (1971) (finding "few isolated incidences" of supervisory conduct, "without more, to be [in]sufficient to establish supervisory indicia"); *Commercial Fleet Wash, Inc.*, 190 NLRB 326 (1971) (three isolated incidents of exercise of supervisory authority insufficient to confer supervisory status). The disciplines provided by the Employer are over four- and five- years old; when asked if there were more recent examples, HR Associate Vice President Turns admitted that after searching the disciplinary files, "we did not find anything other than the documents we've seen since 2011 given by an IPO to a guard." Turns claimed that "the culture of the institution is that we have a lot of verbal warnings," but failed to explain specifically the context that would clarify why IPOs have disciplined employees only twice in the last five years if they do in fact possess such authority.[3] As the record evidence stands, the two reports presented by the Employer are insufficient to establish disciplinary authority.

The Employer argues that the rarity of IPO-issued discipline is irrelevant because it is the possession of supervisory authority, not the exercise of it, that determines supervisory status. The Employer is correct in the law, but misses the issue in this case. As the Board explained in the case cited by the Employer, *Allstate Insurance Company*, "[t]he absence of any exercise of the authority for a sustained and lengthy period—3 to 4 years in this case, as the judge emphasized—raises a question whether the alleged supervisor does in fact possess statutory

[3] Such context could have been provided, for example, with an explanation as to what other discipline has been issued to guards in the past five years, to show whether these reports reflected the rarity of written discipline in general, rather than the IPOs' inability to issue discipline. I will note, however, that Turns' answer when asked if there were any more recent discipline—that HR did not find any other discipline "since 2011 *given by an IPO to a guard*" (emphasis added)—suggests to me that there were other disciplines issued to guards in that time, and that the rarity of IPO-issued discipline stood in contrast to discipline issued by higher-ranking individuals.

supervisory authority." 332 NLRB 759, 760 (2000).[4] That question is raised here, where there is an absence of IPO-issued discipline for a sustained and lengthy period—not 3 to 4 years, but 4 to 5 years. Moreover, the Union's evidence affirmatively answers that question—both IPOs testify that they have no authority to discipline employees. The lack of IPO-issued discipline thus supports the Union's evidence and claim that the IPOs do not, in fact, possess disciplinary authority. The issue is thus not whether the lack of IPO-issued discipline conclusively proves lack of disciplinary authority, but whether the Employer has provided sufficient evidence to prove disciplinary authority in spite of the fact that the IPO witnesses claim they do not have such authority, which is supported by the fact that no IPO has apparently exercised such authority in the last four years. The Employer's reliance on the Operations Manual is not sufficient, and as such, the Employer has failed to show that the IPOs have disciplinary authority.

Instead of discipline, the evidence demonstrates that IPOs' authority as the OIC is limited to collecting and submitting administrative reports, which Turns describes as "just a summary of the events that happened." Thus, such reports do not on their own qualify as discipline. *See Riverboat Services of Indiana, Inc.*, 345 NLRB at 1286; *Franklin Home Health Agency*, 337 NLRB at 830. Mance explained that when faced with a disciplinary situation, he would notify his supervisor "whether they are working or not, and would await instructions and directions on

[4] The Board then abandoned the issue, stating "we find it unnecessary to pursue that line of inquiry in this case," and thus did not apply the principle on which the Employer relies to find supervisory status. In fact, the Board refused to consider whether the employee satisfied any primary indicia of supervisory status in that case, because it found she was not a supervisor under the rationale that she was operating primarily in her own interest. Moreover, while the two other cases the Employer cites to support its argument do state the principle that it is the possession of authority, not the exercise of it, that determines supervisory status, neither finds supervisory status based on that principle. *See Polynesian Hosp. Tours,* 297 NLRB 228, 239 (1989) (despite citing principle, ALJ found two employees to be supervisors based on evidence they actually exercised supervisory authority, and Board reversed ALJ's finding with respect to one because the record was "devoid of evidence that [the employee] exercised the independent judgment"); *Groves Truck & Trailer*, 281 NLRB 1194, 1204 (1986) (despite citing principle, Board did not overturn ALJ's finding that employee was not supervisor because evidence showed only "occasional and sporadic exercise of supervisory power").

what do to." He provided an example of a time when he was OIC and a guard was late for his shift. To address the infraction, Mance notified his sergeant, who then directed Mance to have the guard write an administrative report to the Director of Campus Safety. Perkins also gave an example of her disciplinary authority when she received a complaint from a student officer about a guard. The only thing she could do was have each one of them write an administrative report, and then forward the reports to the Director. Such examples of routine and low-level disciplinary situations—a tardy employee, a complaint about an employee's behavior—should be the situations that an employee with even minor disciplinary authority could address, yet neither IPO did so. Instead, they notified their sergeant, who did not tell them to issue discipline but instructed them to have the offending parties submit reports summarizing the events directly to the Director. Such evidence demonstrates—especially in light of the Employer's failure to offer any evidence of disciplinary reports or evidence of actual exercised disciplinary authority to the contrary—that the IPOs' disciplinary authority is nothing more than a reporting function, and thus does not satisfy Section 2(11)'s requirements.

The Employer argues that IPOs offer verbal discipline to guards, which constitutes discipline under the Employer's progressive disciplinary policy, the first step of which is "oral reminders." Yet there is insufficient evidence that the Employer has taken into account any "verbal discipline" issued by an IPO for purposes of progressive discipline. The Employer has not provided examples of an employee who received a written warning, suspension, or termination that cite a prior oral warning as the reason for the increased level of discipline. The evidence on the issue, in fact, indicates that IPOs' authority to issue "verbal discipline" is restricted to pointing out deficiencies in guards' conduct. For example, Mance, who denied

issuing "any sort of verbal reprimand" to an employee, explained his ability to issue "verbal discipline" as follows:

> Q: …there is no possibility of [an IPO issuing] verbal discipline?"
>
> A: Yeah, there's a possibility of telling a person that they're doing something wrong or they've done something wrong.

Mance describes nothing more than pointing out an error to a guard. There is no evidence that Mance then notified his sergeant of the alleged "verbal discipline," thus moving the guard up the chain of progressive discipline, or that any IPO ever informed a manager about an oral warning issued to a guard. The evidence thus demonstrates that the "verbal discipline" testified to by the IPOs is not progressive discipline but instead the mere pointing out of deficiencies, which does not constitute discipline. *See Shaw, Inc.*, 350 NLRB at 359 (foreman who orally warned employees about job performance deficiencies not a supervisor because warnings were not part of the disciplinary process and there was no evidence they affected employment status); *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 460 (LPSs who verbally counseled and wrote reprimands regarding employees' work not sufficient to show supervisory status without showing adverse impact on employment); *Franklin Home Health Agency*, 337 NLRB at 830.

The Employer also failed to demonstrate that IPOs have the authority to recommend discipline. Other than the two disciplinary reports discussed above, the Employer provided no evidence showing that the IPOs make any explicit disciplinary recommendations, effective or otherwise. Both of the IPOs who testified disclaimed making any disciplinary recommendations for infractions. Instead, they testified that they investigate infractions and submit administrative reports, which contain "just a summary of the events that happened," to higher management. A higher-ranking individual on the IPOs' chain-of-command then makes the disciplinary determination. This investigatory and reporting role indicated by the evidence is insufficient to

establish disciplinary authority in the IPOs through the ability to make disciplinary recommendations. *See Franklin Home Health Agency*, 337 NLRB at 830 ("Reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations.") (internal quotations omitted).

On a slightly different tack, the Employer claims that IPOs have the authority to discipline because they can send guards home early for misconduct, and the guards are not paid for the lost time. I find this claim insufficient to prove disciplinary authority for a number of reasons. First, the Union's witnesses claim they have no such authority. Second, the ability to send home guards without pay contradicts the Employer's Operations Manual, on which the Employer relies heavily for support. The Operations Manual states in Section 55 (Disciplinary Procedures) that an OIC may relieve an employee from duty *with pay* due to misconduct. Third, the Employer is essentially arguing that IPOs have the authority to effectively suspend employees, but the facts here show that the Employer's progressive discipline system already provides for *actual* disciplinary suspensions. However, the record indicates that IPOs cannot suspend employees. If a removal-from-service is a true disciplinary suspension, the Employer has failed to explain why it uses different terms to refer to what it argues are really the same thing. Finally, the evidence does not show that when an IPO sends a guard home early, it lays the foundation for any future discipline under the Employer's progressive disciplinary system.

4. Secondary Indicia

In addition to the evidence regarding the primary indicia of supervisory status discussed above, the Employer introduced evidence of secondary indicia. Specifically, the evidence indicates that the Employer pays the IPOs fifty cents more per hour when they are serving as the OIC, and that the IPOs wear orange epaulettes on their uniforms when serving as the OIC. On

the other hand, the IPOs are not included in supervisory meetings. Weighing the indicia is unnecessary here, however, since I find that the Employer has failed to show that the IPOs possess any primary indicia of supervisory authority which they exercise with independent judgment, so I do not rely on these secondary indicia. In the absence of evidence that an individual possess one of the primary indicia of Section 2(11) supervisory status, "secondary indicia are insufficient by themselves to establish supervisory status." *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer, a Maryland corporation with its sole facility in Baltimore, Maryland, is a non-profit private institution of higher education. During the past 12 months, a representative period, the Employer, in conducting its operations described herein, derived gross revenue of at least $1 million, and during that same period of time, the Employer purchased and received at its Baltimore, Maryland facility, goods valued in excess of $5,000 directly from points located outside the State of Maryland.

3. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

4. The Union is a labor organization as defined in Section 2(5) of the Act.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 2(6) and (7) of the Act.

6. I find the following employees of the Employer constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and part-time Security Guards, Institutional Security Officers/Dispatchers, Eagle One Officers, and Institutional Patrol Officers (IPOs) employed by the Maryland Institute College of Arts at its Baltimore, Maryland facility, excluding all Building Monitors, Campus Safety Aides, Sergeants, office clerical employees, professional employees, managerial employees and supervisors within the meaning of the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the International Union, Security, Police and Fire Professionals of America (SPFPA). The date, time, and manner of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strikes, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election. To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 5, Bank of America Center -Tower II, 100 South Charles Street, Suite 600, Baltimore, Maryland 21201, on or before March 18, 2015. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be

submitted by facsimile transmission at (410) 962-2198. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Consistent with the Agency's E-Government initiative, parties are encouraged to file an eligibility list electronically. If the eligibility list is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Filing an eligibility list electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the eligibility list rests exclusively with the sender. A failure to timely file the eligibility list will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club*

Demonstration Services, 317 NLRB 349 (1995). Failure to do so stops employers from filing objections based on non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on March 25, 2015, at 5:00 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[5] A copy of the request for review must be

[5]A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

(SEAL)

Dated: March 11, 2015

/s/ Charles L. Posner

Charles L. Posner, Regional Director
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